Public Prosecutor v Lim Yew Sen

HIGH COURT (PULAU PINANG) — CRIMINAL TRIAL NO 45–36 OF 2001
KAMALANATHAN RATNAM J
19 JANUARY 2004

Criminal Law — Penal Code (Malaysia) — Section 300 — Murder — Right of private defence — Whether right of private defence established — Penal Code s 100

The accused was charged for causing the death of one Ong by stabbing him with a sharp weapon — an offence under s 302 of the Penal Code. According to the facts, the accused was involved in an argument with the deceased. The argument led to a fight where the accused and the deceased exchanged blows and then attacked each other with iron pipes. The accused eventually stabbed the deceased. The defence submitted on the accused's right of self-defence. The issues for consideration were: (a) whether the accused could rely on the right of private defence; (b) whether words uttered by the deceased was admissible as a dying declaration.

Held, acquitting the accused of murder and reducing the charge to that of culpable homicide not amounting to murder:

(1) What constitutes reasonable apprehension of death or grievous bodily injury is a question of fact to be decided based on the particular facts and circumstances relating to each case (see para 35).

(2) In this case when the deceased with the iron pipe walked out to an open space after repeatedly refusing payment of the sum due to the accused, the accused ought to have known that he should not have followed the deceased to the said place. Instead the accused to the scene knowing that there would be a fight since the accused himself carried with him a similar iron pipe. This is clearly not in private defence (see para 36).

(3) The deceased had uttered the words, 'Is this what you call a gentleman's fight'. This was not a dying declaration and even if it was, the deceased's earlier statement 'pukul sampai mati' clearly showed that the deceased himself was not much of a gentleman to hit a man without a defensive weapon. The dying declaration therefore had to be rejected (see para 37).

[**Bahasa Malaysia summary**

Tertuduh telah dituduh menyebabkan kematian seorang bernama Ong kerana menikam beliau dengan senjata tajam — satu kesalahan di bawah s 302 Kanun Keseksaan. Menurut fakta tersebut, tertuduh terlibat dalam satu pertelingkahan dengan si mati. Pertelingkahan tersebut bertukar menjadi satu pergaduhan di mana tertuduh dan si mati telah bertumbuk dan kemudian menyerang satu sama lain dengan paip besi. Tertuduh kemudian telah menikam si mati. Pihak pembela telah mengemukakan hak menyelamatkan diri tertuduh. Persoalan-persoalan untuk dipertimbangkan adalah: (a) sama ada tertuduh boleh bergantung kepada hak pembelaan persendirian; (b) sama ada perkataan-perkataan yang dinyatakan oleh si mati boleh diterima sebagai satu deklarasi kematian.

Diputuskan, membebaskan tertuduh kerana membunuh dan mengurangkan pertuduhan tersebut kepada keputusan membunuh tanpa niat:

(1) Apa membentuk kemungkinan munasabah akan kematian atau bahaya kecederaan terhadap diri seseorang adalah satu persoalan fakta yang perlu diputuskan berdasarkan fakta dan keadaan tertentu setiap kes (lihat perenggan 35).

(2) Dalam kes ini apabila si mati dengan paip besi telah berjalan keluar ke tempat terbuka selepas beberapa kali enggan membuat bayaran jumlah yang perlu dibayar kepada tertuduh, tertuduh sepatutnya mengetahui bahawa beliau tidak sepatutnya mengikut si mati ke tempat tersebut. Sebaliknya tertuduh telah ke tempat tersebut dengan mengetahui bahawa akan berlaku pergaduhan memandangkan tertuduh sendiri telah membawa paip besi yang sama. Ini jelas bukan pembelaan persendirian (lihat perenggan 36).

(3) Si mati telah mengeluarkan perkataan-perkataan, 'Is this what you call a gentleman's fight'. Ini bukan satu deklarasi kematian dan jikapun ianya begitu, kenyataan terdahulu si mati iaitu 'pukul sampai mati' dengan jelas menunjukkan bahawa si mati sendiri bukan seseorang yang akan memukul seseorang lain tanpa senjata pertahanan. Deklarasi kematian tersebut oleh itu patut ditolak (lihat perenggan 37).]

Notes

For cases on Penal Code s 300, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1155–1168.
For private defence, see 11 *Halsbury's Laws of Malaysia* paras [190.044] – [190.046].

Cases referred to

Laxman Sahu v State of Orisson AIR 1988 SC 83 (distd)
PP v Leo Say & 2 Ors [1985] 2 CLJ 155 (refd)
PP v Tan Hock Beng [2002] MLJU 75; [2002] 3 CLJ 177 (refd)
PP v Yeo Kim Bok [1971] 1 MLJ 204 (distd)
Tan Boon Kean v PP [1995] 3 MLJ 514 (refd)

Legislation referred to

Penal Code ss 300(3), 302, 304(1)

Tuan Azhar bin Mokhtar for the prosecution.
Athimulan (Dev Kumaraendran with him) (Kumar & Co) for respondent.

Kamalanathan Ratnam J:

THE CHARGE

[1] The charge against the accused read that on 17 July 2001 at about 1pm at the car park of the Harbour Trade Centre, Gat Lebuh Macallum, Georgetown in the district of Timur Laut in the state of Pulau Pinang with intent he had caused the death of one Ong Boon Teck by stabbing him with a sharp weapon and was therefore liable under s 302 of the Penal Code.

FACTS

[2] The first witness for the prosecution was Lance Corporal Paramasivam. He was on duty at the Pondok Polis at Lebuh Macallum on 17 July 2001 when he was informed by a male Chinese that a quarrel was going on at the Car Park of the Harbour Trade Centre. When he arrived at the scene he saw four male Chinese attempting to carry an injured person into a car. Two persons then drove off with the injured person to the hospital. He then informed his superior Inspector Rozi of the incident and subsequently reduced the same into a police report. When Inspector Rozi arrived at the scene he handed over to him the two other male Chinese together with their identity cards.

[3] The second witness for the prosecution was Corporal Wan Hassan who on the material date was attached to the beat base at the General Hospital Pulau Pinang. He testified that at about 1.15pm a car arrived bringing a seriously injured Chinese. After he was examined by the doctor at the emergency room, he was informed by the said doctor that the said male Chinese had died whilst on his way to the hospital. The person who accompanied the deceased told him where the scene of the incident was. He then lodged a police report. The third witness was the police photographer. On the material date, he accompanied ASP Hussien to the car park at the Harbour Trade Centre where he was directed to take photographs of the scene. Later, he went to the Hospital mortuary and took photographs of the deceased. Chief Inspector Rozi was the fourth witness. He testified that on the material date, he met the first witness and together with the two other male Chinese and Lance Corporal Paramasivam, he went to the scene and waited for the investigating officer ASP Hussien to arrive. They photographed areas with specks of blood on the ground. He then detained the two male Chinese who were with Lance Corporal Paramasivam.

[4] The fifth witness, Jimmy Chan, was a witness to the incident. On that date at about 11.45 in the morning he went to the Harbour Trade Centre to meet a client. As he stopped his car near the ticket-booth of the car park at the exit, one Ah Keong called for him. He parked his car by the side of the road and went to meet Ah Keong. As he walked towards the ticket-booth, he met Ah Keong, another person nicknamed Durian and another known as Hui Seow. He knew all three of them. He identified Hui Seow as the accused in the dock. He noticed the accused sitting on a beam and scolding and shouting at Ah Keong. After some time, both parties calmed down for a while and then the accused shouted at a person called Uncle who was at the ticket-booth at the entrance to the car park whereas the accused was at the ticket-booth situated at the exit to the car park. The witness testified that he heard the accused use foul language on Uncle. The foul words used when translated read as follows:

Lu mak Ee puki

Lu mak Ee Cibai

Lu mak Ee Len Chow

Lu kata mahu bagi saya kamu tak bagi

Lu mainkan saya Lu main cheating (su pek)

Lu mahu kenakan saya, come-lah

[5] The witness confirmed the translation marked P10 as correct. The court interpreter confirmed that the words translated by her, constituted vile language against the deceased's mother. Soon after this, the accused got down from the beam and picked up a long iron pipe from the ticket-booth. He then hit the beam with the iron pipe and shouted at Uncle. He then flung the pipe onto the ground and again abused Uncle. At this stage, Uncle too ran towards where the accused was and at the same time abusing the accused also in vulgar language.

[6] A quarrel ensued. He and Ah Keong then attempted to settle the issue between the accused and Uncle. They then persuaded Uncle to return to his booth, which he did. After this the accused's friend named Ah Too drove up and entered through the booth where Uncle was and parked his vehicle. He then went up the building and waived to the accused. At this stage, the accused again began to get angry at Uncle. He pointed his hand at Uncle and started abusing him again. Uncle too emerged from his booth and started abusing and shouting at the accused. The accused then looked for the iron pipe he had flung earlier and having found it he also picked up another piece of iron pipe and ran towards the booth where Uncle was. The witness said he then drove his car to where Uncle was. Uncle also picked up an iron pipe from his booth and both of them went over to a vacant place behind the booth to continue with their quarrel. Uncle then hit the accused first and the accused hit him back. Each exchanged blows but Uncle hit the accused many times and the accused's pipe fell from his hand and the accused avoided a hit from Uncle and at that point of time, the accused took out something from his pocket and jabbed at Uncle. When asked by the learned deputy to demonstrate, the witness put his hand into his right pocket, took his hand out and used forward motions like punching or stabbing. Uncle then fell back and scolded the accused and said, 'Is this what you call a gentleman's fight?'.

[7] At this stage, the learned deputy informed the court that he was intending to use Uncle's statement as a dying declaration under s 32 of the Evidence Act 1950. Mr Athimulan's response was that since the learned deputy had established the condition precedent under s 32 of the Evidence Act 1950 he was unable to object for the moment but he reserved his rights. The Learned Deputy then asked that the witness state exactly the words used by Uncle in Bahasa Hokkien since the witness was all the while giving evidence in Bahasa Malaysia. The witness had earlier testified that he spoke fluent Hokkien since his mother was Hokkien. The Court interpreter then recorded the actual words spoken by Uncle in Hokkien and then translated the same into Bahasa Malaysia which is:

> Kan-ni nae (vulgar words). Sudah kalah kamu bawa keluar barang. Adakah ini dikatakan gentleman fight?

[8] The witness having confirmed the translation as correct I marked it as exh P11.

[9] Having said these words, Uncle then ran from the scene and stood by the road side and then fell to the ground. All of them then rushed to the place where Uncle had fallen. He was then alive since he touched his chest with

his right hand which was then welling with blood. The witness then identified the photos of Uncle taken at the mortuary as that of Ong Boon Teck, the deceased.

[10] The others present shouted to the witness to bring his car so that they could rush Uncle to the hospital. They stretched Uncle at the back seat. The accused sat at the front seat. He then drove to the hospital in 15 minutes. Along the journey, he noticed the accused turning back to look at Uncle who was moaning. The accused then pleaded with Uncle not to sleep and not to die. At that moment, the witness said that he noticed the accused holding something small which was chromed and black in colour. He turned to look at the accused as he himself became frightened and he had to concentrate on his driving. He then told the accused not to keep that object in his car. The accused then lowered the window and threw the object which he was holding in his right hand out of the car when they were passing Lebuh Macallum. The accused then said he hoped Uncle would not die. The witness then told the accused to keep calling Uncle's name. The accused then told him to take Uncle to a private hospital but he refused and instead took him to the General Hospital. The accused was talking to himself that Uncle would not die as this was only a quarrel and the object used was also small and here he had referred to the object he had flung out of the car. When they reached the hospital, the attendants directed the accused to hand over his identity card to register but he refused and instead requested the witness to do the needful. From the hospital, the accused asked the witness to drop him off at the coffee shop when the witness informed him that he intended to return to the police beat base manned by Lance Corporal Paramasivam at Lebuh Macallum. The accused having alighted, he proceeded to the beat base. There he met with ASP Hussein who asked him of the whereabouts of the accused. He then accompanied the police personnel to the scene and related the incident. The witness testified that before the commencement of the fight, he had advised both parties not to quarrel but the accused had shouted at him in plain loud voice not to interfere and to stay out.

[11] Under cross-examination, he agreed that the accused was younger than Uncle. He also agreed that Uncle was bigger built than the accused. He also said that he did not know if occasionally Uncle borrowed money from Ah Keong or from the accused. However, he heard the accused refer to Uncle regarding RM7. The distance between both the booths was about 40m. To a suggestion from counsel he agreed it could be even 80m. However, if one shouted from one booth, the person at the other end, could hear what was being said. Uncle came to Ah Keong's exit booth twice, once when he ran towards it and the other when he rode his motorcycle to it and that on both occasions he had scolded the accused and on each occasion his face looked as if he was the aggressor. He has often heard both the accused and Uncle using foul language. When Uncle continued hitting the accused, the accused took out the object from his pocket. He denied a suggestion that the accused did not take out the object from his pocket.

[12] Under re-examination, he said that the accused did not run away from that place to save himself. When both parties picked up iron pipes Uncle had said that it was to be a gentleman's fight.

[13] The sixth witness was the Government Chemist whose evidence was uneventful. The seventh witness was the pathologist who performed the post-mortem on Uncle. He concluded that the cause of death was hemothorax due to stab wound to the heart. He also testified that there were some injuries on the upper limbs of the deceased whose distribution on the body was consistent with those associated with defensive wounds. The deceased also had three other elliptical wounds whose appearance was consistent with having been produced by a sharp weapon. The three wounds were consistent with that of stab wounds. Under cross-examination he opined that the single stab wound to the heart had caused death. One of the subsequent witnesses whose evidence is necessary to be touched upon is the doctor who examined the accused. He confirmed that the accused had sustained an abrasion on his right shoulder and swelling of his right elbow and left shoulder. All these injuries he opined would have been received between five to seven days earlier which was consistent with the day of the fight and he was of the view that they were light injuries and that the accused had not complained of any pain. The next witness was the deceased's brother Ong Boon Peo. Besides identifying the deceased, he also testified that the deceased lived with his mother and that all of the deceased's friends called him Uncle. He was mainly called as a character witness. He testified that once their father had assaulted the deceased for telling a lie and since then the deceased had never lied. The deceased worked for his father's brother although without their father's approval. He did this to earn money for their mother's medical expenses. Under cross-examination, he confirmed the deceased did not visit night clubs or the karaoke although sometimes he drank beer. His brother never spoke vulgar words. Only once the deceased was angry with him and that was because he had used the deceased's motorcycle and had met with an accident, and because of that the deceased had no transport to go to work. Under re-examination he was of the view that his brother was not easily aroused to anger.

[14] With this witness, the prosecution closed its case and offered seven other witnesses to the defence which declined all of the witnesses offered.

FINDINGS OF THE COURT

Submission of no case to answer

[15] At the outset, Mr Athimulan for the defence conceded that it was the accused's act that caused the death. Focussing on the evidence of the eye-witness, counsel submitted that there was a sudden quarrel between the deceased and the accused which led to a sudden fight and that both had used iron pipes at the time of physical confrontation. It was the deceased who first hit the accused and the deceased continued hitting the accused a number of times until the accused's iron pipe fell from his hand. He avoided further assault from the deceased and at that moment, took out something from his pocket and jabbed at the chest of the deceased many times and the medical evidence confirmed that the cause of death was hemothorax due to stab wound to the heart.

[16] Mr Athimulan contended that since the offence is under s 300(3) of the Penal Code this required the prosecution to prove that there was intention

to cause bodily injury to the deceased and that the bodily injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death.

[17] Counsel argued that since those required a mental element of intention, the prosecution had failed to prove such an intention. Counsel's case was that the incident happened at the spur of the moment during a quarrel and that there was no evidence of pre-meditated design to kill, let alone to cause bodily injury which caused death.

[18] On this issue, the learned deputy submitted that it was clear that it was the accused who first started the quarrel with the deceased and thereafter challenged the deceased to a fight by carrying an iron pipe. When the accused went to the open space not just with the iron pipe but with something else which later was found to be a sharp weapon as described by the doctor who performed the post-mortem, there was already the intention to use that weapon. The learned deputy further submitted that when the accused went to the open space he had at least the intention to cause bodily injury and when he used that weapon and stabbed the deceased at the chest he had put into effect the intention to cause the bodily injury.

[19] To see if the prosecution has made out a prima facie case it is best that I repeat what I had said in *Public Prosecutor v Tan Hock Beng* [2002] MLJU 75; [2002] 3 CLJ 177 at p 180 following the guidelines of the Federal Court in *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514 in respect of the prosecution's duty to prove a prima facie case:

> . . . a prima facie case is one where every essential ingredient of the charge is established by sufficient, beyond reasonable doubt evidence and that such evidence can be overthrown by rebutting evidence of the defence sufficient to cause a reasonable doubt on the prosecution's case as to the guilt of the accused.

[20] For this purpose, PW5's evidence is most material. He saw the accused sitting on a beam and shouting and scolding Ah Keong. Then both Ah Keong and the accused calmed down. Then the accused turned his anger against the deceased who was known as Uncle. From one end, ie from the ticket booth at the exit where he was, the accused shouted profanities against the deceased's mother. After abusing the deceased's mother he got down from the beam and picked up a long iron pipe from the ticket booth. He hit the beam with the pipe and flung it to the ground and again abused the deceased. Seeing this, the deceased too picked up another iron pipe from his booth and ran towards the accused, using vulgar language. Somehow PW5 and Ah Keong pacified both parties and persuaded the deceased to return to his booth. After some time, the accused again became angry against the deceased and started abusing him. When the deceased too came out of his booth, the accused picked up the pipe he had flung earlier and ran towards the booth where the deceased was. Both of them then decided to go to a vacant place behind the booth to have what was to be a gentleman's fight.

[21] Once at the open space, the deceased first hit the accused and the accused hit back. After exchange of blows, the accused's iron pipe fell and just as the deceased was about to hit him, the accused warded off the blow and took out the sharp weapon from his right pocket and stabbed the accused

at the chest many times. As the deceased fell he scolded the accused by saying, 'Is this what you call a gentleman's fight?' When the learned deputy informed the court that he intended to admit this statement under s 32 of the Evidence Act 1950. Counsel for the accused conceded that the prosecution having laid the condition precedent under s 32, he was unable to object.

[22] Having said these words, the deceased ran from the scene to the roadside where he fell bleeding profusely. He died on the way to the hospital. On the way to the hospital, PW5 saw the accused holding the weapon which was chromed and black in colour. At this time, PW5 became frightened and requested the accused to get rid of it. The accused then threw the weapon out of the car window.

[23] The injury inflicted on the deceased which caused the death was an elliptical stab wound of the anterior wall of the left ventricle, adjacent to the inter ventricular septum, perforating into the upper part of the left ventricular chamber resulting in several chorda tendinal of the anterior cusp of the mitral valve having been cut. The anterior descending branch of the left coronary artery had been completely transected by the stab wound. The depth of the stab wound was at least ten centimeters.

[24] The deceased had multiple lacerations and abrasions and three stab wounds to the chest. The cause of death was due to hemothorax due to stab wound to the heart. The only injuries sustained by the accused was an abrasion to the right shoulder and swelling of the right elbow and left shoulder.

[25] The accused used the weapon and directed it to the chest and particularly to the area of the heart. He not only used the weapon once but many times and one of the stabbing strokes got at the heart.

[26] At the close of the prosecution's case, the learned deputy informed the court that the case against the accused was one under s 300(3) of the Penal Code which reads as follows:

> 300 Murder
>
> Except in the cases hereinafter excepted culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

[27] Having evaluated the evidence of PW5 and the medical evidence, I was satisfied that the Prosecution had made out a prima facie case against the accused to answer the charge under s 300(3) of the Penal Code.

[28] After the three alternatives had been explained to him, the accused elected to give his evidence under oath.

The defence

[29] The accused testified that on the date of the incident he was 20 years old and was an air-con serviceman. That morning at about 11, he had gone to the scene looking for his friend, Ah Keong to have breakfast together. Ah

Keong worked at the car park which was the scene of the incident. Since he was busy, Ah Keong declined the invitation to breakfast together. He admitted that usually in the course of conversation, he would intersperse with vulgar words. Ah Keong would do likewise. He knew this Uncle for about a year. Uncle was big in size and always looked fierce. Since Ah Keong was stationed at the exit to the car park, he found out from Ah Keong that Uncle was stationed at the entrance to the car park which was about 100m from where he was. He then shouted to Uncle and asked him when he intended to repay the sum of RM14 he owed the accused. The day before the incident, it was the accused who stood in place of Uncle at work and Uncle had promised the accused he would pay him RM14 as his wages but Uncle had instead pocketed the said money. Uncle then asked him to wait and he shouted back and enquired how long he had to wait. When he kept on asking for the money, Uncle then challenged him to see how he would be able to take his money. When he responded by saying he was going to take his money anyway, Uncle replied by saying that if he tried to take the money he would beat him up. They were shouting this conversation at one another since Uncle was at his post. Uncle then began abusing him with vulgar words. He then insisted on being paid. He also abused Uncle with vulgar words. Uncle then ran towards him holding an iron pipe and asked the accused if he wanted to be assaulted. The accused then told him he merely wanted his money as he was afraid. At that time, PW5, Ah Keong and Durian tried to separate both the accused and the deceased. After that, Uncle returned to his post and again began abusing the accused. He called the accused a 'pondan' and challenged the accused to go to his place if he was brave. The accused then replied that all he was interested in was being paid. However when Uncle continued to abuse him he then went up to Uncle, holding an iron pipe himself which iron pipe he found in Ah Keong's pondok and which iron pipe was used to keep the door from closing. He took this iron pipe along because when Uncle came towards him on the earlier occasion Uncle had brought along an iron pipe and he took this iron pipe to protect himself. The reason he went to Uncle was to ask for his money. Uncle then again called him a 'pondan'. Uncle then walked to an open space and the accused followed him and continued asking for his money. Suddenly, the deceased hit him with the iron pipe. He continued hitting him and he could not remember how many times he was hit on his body. He warded off some of the blows and was also able to hit Uncle with his iron pipe. His iron pipe then fell off his hand and Uncle then took a swing at his head which he warded off with his hand and pleaded with Uncle not to hit him anymore and Uncle replied by saying that he would go on hitting him until he died. He was unable to run as Uncle continued to hit him and besides he was afraid to run.

[30] He then remembered having a screwdriver in his pocket. He took it out and used it to stab at Uncle to prevent him from getting near the accused. He did this four to five times. Suddenly, Uncle shouted something which he did not hear and ran out of the place and stood some distance away and again abused him. At that moment, he noticed blood all over Uncle who then collapsed. He then asked PW5 to take Uncle to the hospital. He accompanied Uncle and PW5 to the hospital. In the car, he became frightened and when PW5 told him to throw away whatever weapon he had with him, he threw the

screwdriver out of the car window. After admitting Uncle to the hospital, PW5 sent him back. An hour later, he received a telephone call informing him that Uncle had passed away. As he was an air-con mechanic, he always carried a screwdriver, plier and spanner in his trouser pocket. In any case that day, he was to commence work at 12 noon. He had no intention of going to that place to injure or to kill Uncle. He also did not have any intention of killing Uncle when he made the stabbing motions towards Uncle with the screwdriver.

[31] Under cross-examination, he admitted that he was just a casual friend of Uncle's. In the one year that he had known Uncle, that was the first time Uncle had owed him money. He did not know if Uncle had owed money to anyone else and that he had also refused to repay others. He denied making the statements attributed to him by PW5. It was necessary for him to get back the money that Uncle owed that very day as he needed the money to buy food. He however agreed to a suggestion by the prosecution that he could have actually walked up to Uncle and asked him nicely for the money instead of shouting vulgarities at Uncle from the other end of the car park. He had no fixed time of work. Whenever his employer telephoned him, he had to report for work. He denied a suggestion that PW5 was trying to calm him down since he was abusing Uncle with vulgar words. He also denied a suggestion that he ran up to Uncle's place with the intention of inviting Uncle to a fight. On the contrary, he said it was Uncle who had challenged him to a fight. When he followed Uncle to the open space where the fight occurred he did not feel anything. He just wanted his money back. He did not realize that the situation was dangerous because he was used to Uncle's constant use of vulgarities. He agreed that Uncle did not call him; he just followed Uncle because he thought Uncle was going to give him the money. He also denied the suggestion that he had told PW5 not to interfere in the fight and he also denied the suggestion that he went to the open space in order to fight. Uncle hit him with the iron pipe about four to five times and he too did likewise. Uncle had hit his hand and his body but not on the head. He did not attempt to run because he was afraid to do so. In any case, he was merely defending himself and was not the aggressor. He denied the suggestion that he took the screwdriver from his pocket and stabbed Uncle with it. He denied the suggestion that he did not pick up his fallen iron pipe because he had other plans namely to use the screwdriver and to stab Uncle continuously. It did not dawn on him to ask for help from PW5 when he was being attacked by Uncle.

[32] After the defence had closed its case, Mr Athimulan submitted on the accused's right of self-defence.

After the defence's case

[33] The right of private defence is encapsulated in s 100 of the Penal Code. It reads as follows:

> 100 When the right of private defence of the body extends to causing death.
>
> The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the following descriptions:

A (a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

(c) an assault with the intention of committing rape;

B (d) an assault with the intention of gratifying unnatural lust;

(e) an assault with the intention of kidnapping or abducting;

(f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

C **[34]** In the case before me the relevant sub paras applicable would be (a)and (b). Mr Athimulan contended that in this case even after the deceased's iron pipe had fallen and the accused had pleaded 'jangan pukul', the deceased had said that he intended to hit the accused until he died, the accused was justified in using such amount of force as would constitute self defence even if such force, exerted by the accused had caused death or grievous hurt. Counsel D relied heavily on *Public Prosecutor v Yeo Kim Bok* [1971] 1 MLJ 204, a case in which the present Chief Justice was then the deputy public prosecutor. The facts were almost similar. The accused was charged for having committed culpable homicide not amounting to murder by causing the death of one Lee. The deceased had lent some money to the accused and had demanded its repayment in a very aggressive manner in a coffee shop. Seeing that the accused E remained calm and passive, the deceased picked up a knife on seeing the accused going out of the shop through its rear door. After picking up the knife, the deceased rushed towards the accused who had no way of escaping. The accused then picked up a wooden ladle and with it hit the knife which was held by the deceased. As soon as the knife fell to the ground, both tried to grapple with each other. After a short struggle, a witness saw an object which looked F like a knife in the accused's hand. Evidence showed that the deceased was of better build and strength than the accused. It was the act of the accused which caused the death of the deceased. Sharma J held that there was a reasonable apprehension of danger to the life of the accused when the deceased rushed at him with the knife in his hand and that the accused had the right of private defence which extended even to the killing of the deceased. The court G further held that based on the evidence there was a reasonable probability that if the deceased had got hold of the knife he would have used it on the accused. In the circumstances and in the situation in which the accused found himself, there was bound to be in his mind a reasonable apprehension of death or grievous hurt being caused to him by the deceased unless he got out of the reach of the deceased. The deceased was acquitted.

H **[35]** What constitutes a reasonable apprehension of death or grievous bodily injury is a question of fact to be decided based on the particular facts and circumstances relating to each case. Whilst it is apparent that there certainly was the apprehension of death or grievous bodily injury in *Yeo Kim Bok* because he was cornered and was unable to escape when the deceased confronted him I with a knife, that was not the situation in the case before me. When the deceased with an iron pipe walked out to an open space after repeatedly refusing payment of the sum due to the accused, the accused ought to have known that he should

not follow the deceased to the said place. Instead the accused went to the scene and in my view, knowing that there would be a fight since the accused himself carried with him a similar iron pipe.

[36] In this case, both used iron pipes to fight. Whilst evidence showed clearly that the deceased was bigger built and was heavier than the accused the accused was able to stand his ground. However, when his iron pipe was knocked off his hand and when the deceased was about to hit him with his iron pipe, he pulled out his screwdriver and used it as a prod to ward off the deceased. Whilst this could have been acceptable to form a right of private defence since the deceased said he was going to kill him, I was not prepared to concede that this was a right of self-defence. The accused asked for this fight by going to the scene. He could have avoided putting himself in that predicament by going away and not following the deceased to the open space where he know a fight was imminent. Knowing that the deceased was bigger and heavier than him, he ought to have avoided the confrontation. However, it was meant to be a gentleman's fight with each party using the iron pipe that each had. When the situation became deadly, namely when the accused's iron pipe fell and when the deceased threatened to rain blows with intent to kill, the accused stabbed him with the screwdriver. This is clearly not in private defence. The injuries sustained by the deceased showed that the accused did not just merely try and ward off the deceased. The stabbings were done with the intention of causing bodily injury. In *Laxman Sahu v State of Orisson* AIR 1988 SC 83, the Supreme Court of India held that the right of private defence was available to one who is suddenly confronted with an immediate necessity of averting an impending danger not of his creation and that the necessity must be present, real or apparent. In the case before me, the accused deliberately followed the deceased to the open car park literally spoiling for a fight.

[37] The prosecution relied on the deceased's dying declaration to establish a case of murder. It is a fact that a dying declaration need not be proved by writing. Such a declaration can be introduced into evidence by the oral testimony of eyewitnesses. To my mind, even if I accept the statement made by the deceased as a dying declaration, all he had said was, 'Is this what you call a gentleman's fight' or words to that effect. But it happened to be a gentleman's fight all along until circumstances changed that is when the accused fell and when his iron pipe too fell and the deceased intended to hit the accused 'sampai mati'. On the other hand, if the deceased's statement was a dying declaration and was meant to reflect a gentleman's fight, then the deceased's earlier statement of 'pukul sampai mati' clearly showed that the deceased himself was not much of a gentleman to hit a man without a defensive weapon. I therefore rejected the statement as a dying declaration.

[38] I therefore found that the prosecution had failed to prove a case of murder. However, I found the accused guilty of the reduced charge of culpable homicide not amounting to murder under s 304(1) of the Penal Code which reads as follows:

> 304 Punishment for culpable homicide not amounting to murder.
>
> Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to twenty years, and shall also be

liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[39] In mitigation, Mr Athimulan pointed out that at the time of the commission of the offence the accused was only 20 years old with only a Form Three education. He was working as an air-con repairer. When he was in Standard Three he had lost his father and one year before this incident, he had lost his brother. He had no other bad record and was a first offender. He urged me to consider the factual situation at the material time. The deceased was older, bigger built and aggressive. It was a sudden fight, and the accused had exceeded his right of self-defence in the heat of the fight. He showed remorse after the injuries were inflicted and urged PW5 to take the deceased to the hospital and was urging the deceased not to die, throughout the journey to the hospital. He had written to the Attorney General to reduce the charge and if that had been done as the court had done, then his client would have pleaded guilty to the amended charge and would have saved judicial time. The accused himself was injured and had fully co-operated with the police.

[40] In seeking for a heavy sentence, the learned deputy urged me to consider the fact that a life had been taken and that the fact that the accused was a first offender ought not to weigh against meeting out a heavy sentence and in support he relied on *Public Prosecutor v Leo Say & 2 Ors* [1985] 2 CLJ 155 wherein NH Chan J (as he then was) held that the fact that a man has not much of a criminal record or none at all is not a powerful factor to be taken into consideration in a case of such gravity. The learned deputy submitted that the case before me also was grave and merited similar consideration by the court. Since s 304(1) provided for a maximum sentence of 20 years, the learned deputy urged me to sentence adequately.

[41] Having considered all issued and also the fact that the accused was at that moment trying to ward off the deceased, I sentenced him to nine years in prison, to commence from the date of his arrest.

Accused acquitted of murder. Charge reduced to that of culpable homicide not amounting to murder.

Reported by Mariette Peters-Goh